SIM KOOI SOON A

v.

MALAYSIA AIRLINES SYSTEM

COURT OF APPEAL, PUTRAJAYA B
ABDUL MALIK ISHAK JCA
KANG HWEE GEE JCA
AZHAR MA'AH JCA
[APPLICATION NO: W-04-22-2005]
11 SEPTEMBER 2009 C

CIVIL PROCEDURE: *Setting aside - Application for - Applicant seeking order that all previous orders of the court deemed 'irregular' or to be 'set aside' - Whether court had jurisdiction to review previous decisions - Persistent conduct of applicant in making numerous applications to review decision of court - Whether in bad faith - Whether an abuse of court process - Whether application dismissed* D

By way of a notice of motion in encl. 134a, the applicant sought an order that all the previous orders of this court be deemed 'irregular' and to be 'set aside'. Briefly, the applicant had on eight previous occasions filed eight separate applications to review the decision of the Court of Appeal handed down on 5 December 2006 dismissing the applicant's application to adduce further evidence as well as the applicant's appeal against a decision of the High Court. All the eight review applications were dismissed by eight different panels of this court unanimously. The present application in encl. 134a was another attempt by the applicant to re-open the appeal and to re-litigate the same. E F

Held (dismissing encl. 134a with costs) G
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) Enclosure 134a constituted the applicant's ninth review application and it was certainly an abuse of the process of the court. The court had no jurisdiction to review its previous decision made on 5 December 2006 and the applicant was advised to file an application for leave to appeal to the Federal Court. That would be the best course of action for the applicant to undertake. The persistent conduct of the applicant in filing eight review applications prior to filing the present application in encl. 134a was peppered with 'baseless, scandalous H I

A and/or vexatious aspersions and/or insinuations directed at the previous eight panel members of the Court of Appeal' that have heard and dismissed all eight review applications. They were all done in bad faith and without regard to the consequences attendant thereto. Accordingly, encl. 134a should be dismissed
B as it had no merit and had no basis, in law, whatsoever. (paras 6, 13 & 14)

Bahasa Malaysia *Translation Of Headnotes*

C Melalui notis usul dalam lampiran 134a, pemohon membuat permohonan untuk perintah bahawa semua perintah-perintah mahkamah sebelum ini dianggap 'luar aturan' atau 'diketepikan'. Secara ringkas, pemohon telah memfailkan lapan permohonan untuk mengkaji semula keputusan Mahkamah Rayuan yang diturunkan
D pada 5 Disember 2006 yang telah menolak permohonan pemohon untuk mengemukakan keterangan tambahan dan juga rayuan pemohon terhadap keputusan Mahkamah Tinggi. Semua permohonan kajian semula ditolak oleh lapan panel yang lain dengan sebulat suara. Permohonan dalam kes ini di lampiran 134a
E adalah lagi satu percubaan pemohon untuk membuka balik rayuan dan untuk melitigasi semula yang sama.

Diputuskan (menolak lampiran 134a dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

F
(1) Lampiran 134a merupakan permohonan kajian semula pemohon yang kesembilan dan ia adalah satu salahguna proses mahkamah. Mahkamah tidak mempunyai bidangkuasa untuk mengkaji semula keputusan terdahulu yang dibuat pada
G 5 Disember 2006 dan pemohon dinasihatkan supaya memfailkan permohonan kebenaran untuk merayu kepada Mahkamah Persekutuan. Itu adalah jalan yang paling sesuai bagi pemohon. Tindakan berterusan pemohon dalam memfailkan lapan permohonan kajian semula sebelum memfailkan permohonan ini
H di dalam lampiran 134a dipenuhi dengan 'cacian atau sindiran yang tidak berasas, memeranjatkan dan/atau menyusahkan yang diarahkan kepada lapan ahli-ahli panel Mahkamah Rayuan' yang telah membicara dan menolak kesemua permohonan kajian semula. Semuanya dilakukan dengan niat tidak betul tanpa
I mengambil kira akibat-akibat. Oleh itu, lampiran 134a harus ditolak kerana ia tidak mempunyai merit dan tidak mempunyai asas, dari segi undang-undang.

Case(s) referred to:

Attorney-General v. Leveller Magazine Ltd And Others, Attorney-General v. National Union of Journalists, Attorney-General v. Peace News Ltd And Others [1979] AC 440 ***(refd)***

Canadian Broadcasting Corp v. Quebec (Police Commission), Canadian Broadcasting Corporation et al v. Cordeau et al [1979] 101 DLR (3d) 24 ***(refd)***

Ex parte Pater [1864] 122 ER 842 ***(refd)***

Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No 2) [2002] 6 CLJ 6 HC ***(refd)***

Goldsmith v. Sperrings Ltd [1972] 2 All ER 566 ***(refd)***

Her Majesty The Queen v. Kevin Ernest Dunning [1979] 50 CCC (2d) 296

Hui Chi-ming v. R [1991] 3 All ER 897 ***(refd)***

Johnson v. Gore Wood & Co (a firm) [2002] 2 AC 1 ***(refd)***

Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd [2002] 7 CLJ 81 HC ***(refd)***

Morris And Others v. Crown Office [1970] 2 QB 114 ***(refd)***

Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653 ***(refd)***

Regina v. Monette [1975] 64 DLR (3d) 470 ***(refd)***

Sparks, & C v. Martyn [1726] 1 & 2 Ventris 1 ***(refd)***

The King v. Almon [1765] 97 ER 94 ***(refd)***

The King v. Metal Trades Employers' Association And Others, Ex Parte Amalgamated Engineering Union, Australian Section [1950-1951] 82 CLR 208 ***(refd)***

The Queen v. Lefroy [1872-73] 8 LRQB 134 ***(refd)***

Vaillancourt v. The Queen [1981] 120 DLR (3d) 740 ***(refd)***

Walter Lyulph Johnson v. John Grant And Others [1923] SC 789 ***(refd)***

For the applicant - In person

For the respondent - Janice Anne Leo (Maximilian Tai with her); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Application For Judicial Review No: R1-25-87-2001]

[Editor's note: For the High Court judgment, please see Sim Kooi Soon v. Malaysia Airline System [2005] 2 CLJ 797)

Reported by Suhainah Wahiduddin

A

JUDGMENT

Abdul Malik Ishak JCA:

[1] By way of a notice of motion dated 12 May 2009 as seen in encl. 134a, the applicant seeks an order that all the previous orders of this court be deemed "irregular" and be "set aside" The application is supported by an affidavit of the applicant affirmed on 12 May 2009 together with an additional affidavit that was affirmed on 6 July 2009 followed by another affidavit that was affirmed by the applicant on 21 August 2009.

[2] In response thereto, the respondent filed an affidavit in reply through Puan Ina Anzalna Shamsuddin that was affirmed on 7 July 2009.

[3] We have perused through all the affidavits as alluded to above with a fine tooth comb and we must categorically say that the application in encl. 134a is wrong in law and is an abuse of the process of the court and must be struck out *in limine*. Baseless and unsubstantiated allegations were advanced in the applicant's affidavits in an attempt to justify the orders sought for in encl. 134a.

[4] We take note that the background facts to this application are quite chequered. The applicant had on eight previous occasions filed eight separate applications to review the decision of the Court of Appeal dated 5 December 2006. All the eight review applications were dismissed by eight different panels of this court unanimously. It is clear as crystal that the present application in encl. 134a is another attempt by the applicant to re-open the appeal and to re-litigate the same.

[5] It would be ideal, at this juncture, to set out the chronological sequence of the applicant's previous applications to this court:

(a) on 5 December 2006, the Court of Appeal dismissed the applicant's application to adduce further evidence as well as the applicant's appeal against the decision of the High Court dated 4 May 2005;

(b) on 8 December 2006, the applicant filed a notice of motion ("the first review application") to review the decision of the Court of Appeal dated 5 December 2006 and at the hearing of

the first review application on 8 January 2007, the applicant voluntarily withdrew his application and the Court of Appeal forthwith dismissed it;

(c) on 11 January 2007, the applicant again filed a second notice of motion ("the second review application") and sought to review the decision of the Court of Appeal dated 5 December 2006 and the Court of Appeal dismissed with costs the second review application on 13 February 2007;

(d) it is germane to mention that during the hearing of the second review application on 13 February 2007 before another panel of this court, the applicant was advised to file an application for leave to appeal to the Federal Court; and, in fact, Zulkefli bin Ahmad Makinudin JCA (now FCJ) who sat on that panel reminded the applicant that another panel of this court that sat on 8 January 2007 had advised him to file an application for leave to appeal to the Federal Court;

(e) on 27 February 2007, the applicant filed a third notice of motion ("the third review application") to review the decision of the Court of Appeal dated 5 December 2006 and it was also dismissed with costs by the Court of Appeal on 21 May 2007;

(f) on 16 November 2007, the applicant filed a fourth notice of motion ("the fourth review application") to review the decision of the Court of Appeal dated 5 December 2006 and the Court of Appeal on 5 December 2007 dismissed with costs the fourth review application;

(g) on 18 February 2008, the applicant filed a fifth notice of motion ("the fifth review application") to review the decision of the Court of Appeal dated 5 December 2006 and the Court of Appeal on 14 April 2008 dismissed with costs the fifth review application;

(h) undaunted, the applicant filed on 2 July 2008 the sixth notice of motion ("the sixth review application") to review the decision of the Court of Appeal dated 5 December 2006 and, again, it was dismissed with costs by the Court of Appeal on 14 October 2008;

(i) yet again, the applicant filed his seventh notice of motion on 16 October 2008 ("the seventh review application") to review the decision of the Court of Appeal dated 5 December 2006 and the Court of Appeal on 5 January 2009 dismissed it with costs; and

(j) finally, on 16 January 2009, the applicant filed his eighth notice of motion ("the eighth review application") to review the decision of the Court of Appeal dated 5 December 2006 and, at the same time, the applicant also filed two notice of motions to adduce further evidence dated 4 May 2009 and 15 April 2009 respectively (collectively referred to as the "applications to adduce further evidence"), and the Court of Appeal heard the eighth review application as well as the applications to adduce further evidence on 11 May 2009 and dismissed them with costs.

[6] Without a doubt, encl. 134a constitutes the applicant's ninth review application and it is certainly an abuse of the process of the court. Authorities are abound in the law journals on the subject of an abuse of the process of the court. While sitting on the High Court bench, I had occasion to examine the doctrine of abuse of process in the following three cases:

(a) *Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No 2)* [2002] 6 CLJ 6;

(b) *Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 7 CLJ 81; and

(c) *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653, at p. 670, and *Multimedia Development Corporation Sdn Bhd v. Pembinaan Purcon Sdn Bhd* [2006] 2 AMR 507, at p. 525.

[7] On abuse of process of the court, this was what I said in *Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (supra)* particularly at p. 16 to p. 17 of the report:

> Abuse of process
>
> In regard to an abuse of process, I have this to say. Since time immemorial, the courts have exercised its powers under the inherent jurisdiction by summary process to terminate proceedings which were frivolous or vexatious or which were an abuse of the process (*Veale v. Warner* [1669] 1 Wms Saund 575; and *Johnson v. Stephens & Carter Ltd & Golding* [1923] 2 KB 857). Way back in 1875, the Court of the Exchequer in the case of *Castro v. Murray* [1875] LR 10 Ex 213 - which was an action against the clerk of the petty bag office in the Court of Chancery for refusal to seal a writ of error, decided that it had power to summarily dismiss an

action as being an abuse of the process of the court. The Queens Bench Division in 1876 in the case of *Dawkins v. Prince Edward of Saxe Weimar* [1876] 1 QBD 499 - which was an action against members of a military court of inquiry for damages for conspiracy, dutifully followed the decision of *Castro v. Murray*. Blackburn J, delivering the judgment in *Dawkins v. Prince Edward of Saxe Weimar* aptly said at p 502 of the report:

> Have we, although we see the action is utterly groundless, a right to stop it summarily?

As I see it, once it becomes apparent that the abuse of process becomes a ground for the court to terminate the proceedings summarily under its inherent jurisdiction, then it becomes a solid basis for the court to invoke its inherent powers. At the local scene, the inherent powers of the court finds its way in the Rules of the High Court 1980 ('the RHC') as per O. 92 r. 4 thereof which states as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Generally speaking, the process of the court must be used properly, honestly and in good faith and it must not be abused. That must surely be the best way to describe the meaning of the term 'abuse of process'. The court will certainly not allow itself to be misused. The court will certainly ensure that its machinery will not be used as a means of vexation or even oppression. It is to prevent the misuse of the legal machinery that the court must be vested with the power to intervene summarily. Once an abuse of process has been detected, the court must intervene to stay or even to dismiss the proceedings and this would be the very essence of justice (see the speech of Lord Blackburn in *Metropolitan Bank v. Pooley* [1885] 10 App Cas 210). The summary process of the court must be vigorously applied to prevent frivolous, vexatious or groundless litigation.

It is an abuse of process where the proceedings are frivolous or vexatious and this would be the typical situation in any given case.

[8] Again, in the same vein, I had this to say in regard to the meaning of the term "abuse of process" in the case of *Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd (supra)* particularly at p. 87 to p. 88:

A Abuse of the process of the court

It is said that the process of the court must be used *bona fide* and properly and must not be abused. The court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation (*Castro v. Murray* [1875] 10 Ex 213).

B

The classifications of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed. Much will depend on all the relevant circumstances and, towards this end, the considerations of public policy and the interests of justice may be relevant and material. Thus, it is an abuse of the process of the court for a party to re-litigate the issue of fraud after it has been tried and decided by an Irish Court (*House of Spring Gardens Ltd v. Waite* [1990] 2 All ER 990). It is also an abuse of the process of the court and the claim will be struck out if it is groundless and unfounded in the sense that the plaintiff does not know any of the facts to support it (*Steamship Mutual Underwriting Association Ltd v. Trollope and Colls (City) Ltd* [1986] 33 Build LR 77 (CA)).

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I must at once say that the burden upon an applicant who asks that a writ of summons and the statement of claim to be struck out is a heavy one. It is indeed onerous. He must be able to show that the action must fail or that for some other reason it is an abuse of the process of the court or is frivolous or vexatious.

E

[9] Finally, in *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd (supra)* particularly at p. 670 of the MLJ report and at p. 525 of the AMR report, I had this to say about the abuse of process by referring to the speech of Lord Denning in G*oldsmith v. Sperrings Ltd* [1972] 2 All ER 566, at p. 574:

F

The principle was explained thus by Lord Denning in *Goldsmith v. Sperrings Ltd* [1972] 2 All ER 566 at p 574:

G

> In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The Judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

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> Sometimes abuse can be shown by the very steps being taken in the Courts, ... Again, where a pamphlet contained two different passages, each defamatory of a man, and he brought two separate actions, one for each passage. He failed on the first. The second was stayed. Fry LJ saying: ... such successive actions ... would be an abuse of the process of the Court ...: see *MacDougall v. Knight* ... .

[10] When you say that you are abusing the process of the court, you are in fact saying that the proceeding is lacking in *bona fides* and is not only frivolous, it is also vexatious or oppressive. Making use of the process of the court in an oblique way amounts to an abuse of the process of the court. And the person who abuses the process of the court is only interested in accomplishing some improper purpose and that is to mount a collateral attack which offends justice.

[11] Perhaps, the principles of an abuse of process of the court are appropriately explained in the case of *Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1, at p. 31. There Lord Bingham succinctly said:

> The underlying public interest is ... that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list

A all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not ... Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

B **[12]** Another useful and succinct definition of the term "abuse of process" can be found in the case of *Hui Chi-ming v. R* [1991] 3 All ER 897, at p. 914. There the Privy Council said "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding". C And when you substitute the word "prosecutor" with the word "applicant", you will get the situation like what we are now having in encl. 134a which is certainly "unfair and wrong" for this court to proceed to adjudicate the said enclosure bearing in mind that it is "unfair and wrong" for the applicant to have filed the said D enclosure, in the first place.

[13] We are constrained to say that this court has no jurisdiction to review its previous decision made on 5 December 2006 and the applicant is advised to file an application for leave to appeal to the E Federal Court. That would be the best course of action for the applicant to undertake. Accordingly, encl. 134a should be dismissed forthwith with costs bearing in mind that it has no merit and has no basis, in law, whatsoever.

F **[14]** Lest I be accused of an oversight, I must venture further and I say that the persistent conduct of the applicant in filing eight review applications prior to filing the present application in encl. 134a peppered with "baseless, scandalous and/or vexatious aspersions and/or insinuations directed at the previous eight panel G members of the Court of Appeal" that have heard and dismissed all eight review applications were done in bad faith and without regard to the consequences attendant thereto. Those unfounded allegations against the eight panel members of the Court of Appeal are contemptuous in nature. We have wide and extensive contempt H powers vested in us but, we will always exercise it cautiously, judiciously and not callously. As Lord President Clyde said in *Walter Lyulph Johnson v. John Grant And Others* [1923] SC 789, at p. 790 which was cited with approval, *inter alia*, by Lord Edmund-Davies in *Attorney-General v. Leveller Magazine Ltd And Others, Attorney-General v. National Union of Journalists, Attorney-General v.* I *Peace News Ltd And Others* [1979] AC 440, at p. 459:

> The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned ... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice ... It is not the dignity of the court which is offended - a petty and misleading view of the issues involved - it is the fundamental supremacy of the law which is challenged.

[15] We say that "hurling insults at judges" as reflected in the affidavits of the applicant constitute "contempt in the face of the court". Wilmot J, in the celebrated case of *The King v. Almon* [1765] 97 ER 94, 1-3 Wilm. 243, 254, at p. 99 in trenchant terms said:

> The power, which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it.

[16] Even Lord Denning MR in *Morris And Others v. Crown Office* [1970] 2 QB 114, CA, at p. 122, [1970] 1 All ER 1079, at p. 1081 made these apt observations in the context of "contempt in the face of the court":

> The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power - a power instantly to imprison a person without trial - but it is a necessary power.

[17] Cases like *Ex parte Pater* [1864] 122 ER 842, 5 B & S 299; *The Queen v. Lefroy* [1872-73] 8 LRQB 134; *Sparks, & C v. Martyn* [1726] 1 & 2 Ventris 1; *Regina v. Monette* [1975] 64 DLR (3d) 470 at 474; *Her Majesty The Queen v. Kevin Ernest Dunning* [1979] 50 CCC (2d) 296, CA; *Canadian Broadcasting Corp v. Quebec (Police Commission), Canadian Broadcasting Corporation et al v. Cordeau et al* [1979] 101 DLR (3d) 24; *Vaillancourt v. The Queen* [1981] 120 DLR (3d) 740; and *The King v. Metal Trades Employers' Association And Others, Ex Parte Amalgamated Engineering Union, Australian Section* [1950-1951] 82 CLR 208, laid down one singular principle of law. It is this. That the power to punish contempt is an inherent power vested in all courts. We were urged, by way of an affidavit in reply,

to take an appropriate action against the applicant for making those "baseless, scandalous and/or vexatious aspersions and/or insinuations directed at the previous eight panel members of the Court of Appeal" but we decline, fortunately, to do so. We are of the considered view that we should temper justice with mercy. But this should not give a false impression that this court is lenient towards the applicant. Neither should our magnanimous gesture be construed as giving a *carte blanche* to the applicant to repeat what he has done. The applicant is advised from repeating the same mistake again.

[18] For the reasons adumbrated above, we unanimously dismiss encl. 134a with costs. We reiterate that the applicant should file an application for leave to appeal to the Federal Court.